

4
No. 96-8422

Supreme Court, U. S.

FILED

JAN 23 1998

CLERK

In The
Supreme Court of the United States

October Term, 1997

— ♦ —
SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

— ♦ —
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**
— ♦ —

JOINT APPENDIX
— ♦ —

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— ♦ —
**Petition For Certiorari Filed March 31, 1997
Certiorari Granted December 12, 1997**
— ♦ —

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**RELEVANT DOCKET ENTRIES
FROM U.S. DISTRICT COURT**

- 7/21/95 1 COMPLAINT as to Sillasse Bryan, Fnu Lnu, Nicole Bradley, Deloras Tillman [1:95-m -1136] (th) [Entry date 08/28/95]
- 8/25/95 4 INDICTMENT as to Sillasse Bryan (1) count(s) 1, 2 (11) [Entry date 08/30/95]
- 9/8/95 7 NOTICE of Appearance for Sillasse Bryan by Attorney Roger B. Adler (dd) [Entry date 09/08/95]
- 9/27/95 9 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 9/27/95 at 10:15a.m. for status conference. Court Reporter/ ESR Mark Gjela. AUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Status conference held. Speedy trial info entered. Further status conference set for 11/21/95 at 5:00p.m. Defenswe [sic] motions to be filed 10/31/95. Govt response 11/14/95. (dd) [Entry date 10/10/95]
- 12/22/95 15 MOTION by Sillasse Bryan to Suppress; Motion Hearing/Return date of 9:30 1/28/96 for Sillasse Bryan [15-1] motion to suppress post arrest statements, grabnting [sic] a "Simmons" Hearing, ordering discovery, serve and file a Bill of Particulars, in liminie [sic]. Attached affidavit of Roger Adler in support of motions. Attached exhibits A-E. (dd) [Entry date 12/22/95]
- 3/4/96 28 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G.

Trager on date of 3/4/96 at 9:30a.m. for suppression hearing. Court Reporter/ESR H. Driscoll. denying [15-1] motion to suppress as to Sillasse Bryan (1), Not Guilty: Sillasse Bryan (1) count(s) is, 2sAUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Status conference for suppression hearing held. (dd) [Entry date 03-11-96]

- 3/11/96 31 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 3/11/96 at 2:15p.m. for jury trial Court Reporter/ESR M. Picozzi AUSA Elaine Banar. Defense counsel: Roger Bryan. Case called. Deft appear with counsel. Jurors sworn and trial begins. Govt opens. Deft opens. Jury trial held. Jury trial continued to 3/12/96 at 10:00a.m. (dd) [Entry date 03/12/96]
- 3/11/96 32 CALENDAR ENTRY as to Sillasse Bryan; Case called before Magistrate John L. Caden on date of 3/11/96 at 9:30a.m for jury selection Court Reporter/ESR Gene Rudolph. AUSA Elaine Banar/Alan Vinegrad. Case called. Counsel present. Consent to proceed before USMJ executed. Jury selected. Jury not sworn. (dd) [Entry date 03/13/96]
- 3/13/96 33 Deft Sillasse Bryan's Request to Charge. (1g) [Entry date 03/13/96]
- 3/13/96 34 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 2/13/96 at 11:30a.m. for jury trial. Court Reporter/ESR M.

Picozzi AUSA Elaine Banar. Defense counsel: [sic] Roger Bryan. Case called. Deft. appears with counsel, Jury trial held. Jury trial resumes. Jury trial continued to 3/14/96 at 10:00a.m. Deft rests. Govt summation. Deft summation. Govt rebuttal. Deft's rule 29 motion is denied. (dd) [Entry date 03/18/96]

- 3/14/96 36 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 03/14/96 at 10:00a.m. for jury trial. Court Reporter/ESR M. Picozzi, Guilty: Sillasse Bryan (1) count(s) 1s, 2s AUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Jury trial ends. Jury charged, alternate jurors excused, U.S. M. sworn, and deliberations begin. Jurors polled and excused. (dd) [Entry date 03/18/96]
- 3/15/96 37 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 3/15/96 at 3:30p.m. for status conference. Court Reporter/ESR M. Picozzi. AUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Status confernece [sic] held. Sentencing set for 5/31/96 at 9:45a.m. Deft continued on bail. (dd) [Entry date 03/19/96]
- 3/21/96 40 MOTION by Sillasse Bryan to Set Aside Verdict. Motion Hearing/Return set for 10:15 on 4/19/96. (tj) [Entry date 04/17/96]
- 4/12/96 38 MEMORANDUM by USA as to Sillasse Bryan in opposition to defendant's

motion for a new trial. (tj) [Entry date 04/15/96]

- 5/10/96 42 LETTER dated 5/9/96 from Roger B. Adler, Esq. to Judge Trager in reply to the government's opposition to defendant's motion to set aside the jury verdict. (tj) [Entry date 05/14/96]
- 6/3/96 44 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on 6/3/96 for sentencing. AUSA: Elaine Banar. Defense Attorney: Roger Adler. Court Reporter: Allan Sherman. Defendant sentenced on count (1) and (2) to 57 months of imprisonment and 3 years of supervised release. Underlying indictment is dismissed. Special Assessment: \$100.00. Defendant to participate in a drug treatment program. (tj) [Entry date 07/02/96]
- 6/3/96 - DISMISSAL of Count(s) on Government Motion as to Sillasse Bryan Termination motions: Counts Dismissed: Sillasse Bryan (1) count(s) 1, 2. (tj) [Entry date 07/03/96]
- 6/28/96 45 JUDGMENT Sillasse Bryan (1) count(s) 1s, 2s. Defendant sentenced to 57 months of imprisonment. The court that the defendant be placed in the Boot Camp Program when he reaches that part of his sentence. Supervised release: 3 years. The defendant shall participate in a drug treatment program as directed by the Probation Department, the defendant shall submit his person, residence, and place of business to a search as directed by the Probation, and the defendant

shall not possess a firearm or device. Special Assessment: \$100.00. Underlying indictment dismissed on government's motion. (Signed by Judge David G. Trager on 06/03/96) (tj) [Entry date 07/03/96]

- 7/3/96 46 NOTICE OF APPEAL by Sillasse Bryan (1) count(s) 1s, 2s. The defendant appeals the judgment that was entered on 7/3/96. NO FEE PAID for the defendant has a CJA attorney. Forms distributed. USCA notified. PLEASE NOTE: THIS NOA WAS ORIGINALLY FILED ON 6/7/96. (mcg) [Entry date 07/08/96]
- 7/8/96 - Notice of appeal and certified copy of docket as to Sillasse Bryan to USCA:
- [46-1] appeal (mcg) [Entry date 07/08/96]
-

**RELEVANT DOCKET ENTRIES FROM
SECOND CIRCUIT COURT OF APPEALS**

7/9/96 Copy of District Court docket entries and notice of appeal on behalf of Appellant Sillasse Bryan filed. [96-1450] (cr16)

7/10/96 Scheduling order no. 1 filed, continuing counsel: Roger B. Adler, Esq. pursuant to CJA. Record on appeal due on 7/30/96. Appellant brief and joint appendix due on 8/29/96. Appellee's brief due on 9/30/96. Response Anders brief due on 9/12/96. Argument as early as week of 10/21/96. (cr16)

7/10/96 CJA voucher issued to counsel: Roger B. Adler, Esq. for Sillasse Bryan (Voucher #: 0673072) [96-1450] (cr16)

8/12/96 Record on appeal index in lieu of record filed. (cr16)

8/16/96 Letter dated 8/15/96 from Roger B. Adler, Esq. regarding motion for extension received (cr16)

8/16/96 Appellant Sillasse Bryan motion for enlargement of time within which to perfect appeal FILED (w/pfs). [843528-1] (cr16)

8/16/96 Order FILED GRANTING motion for extended time [843528-1] by Appellant Sillasse Bryan, endorsed on motion form dated 8/16/96. Extended appellant's brief due date is 9/20/96. Extended appellee's brief due date is 10/21/96. Extended argument week as early as 11/4/96. (BJM) Cancel response to Anders brief due. (cr16)

9/20/96 Appellant Sillasse Bryan brief FILED with proof of service. (cr16)

9/20/96 Appellant Sillasse Bryan appendix filed w/pfs. Number of volumes: 1. (cr16)

10/22/96 Appellee USA brief filed with proof of service. SERVICE BY MAIL. (cr16)

12/5/96 Proposed for argument the week of 1/27/97. (ca96)

12/18/96 Set for argument on 1/29/97. [96-1450] (ca96)

1/29/97 Case heard before WALKER, PARKER, HEANEY C.JJ. (TAPE: #142) (ca95)

2/10/97 Judgment filed; judgment of the district court is AFFIRMED by detailed order of the court without opinion filed. (JMW) (cr16)

3/3/97 Judgment MANDATE ISSUED. (cr16)

3/26/97 Mandate receipt returned from the district court. (ren)

4/4/97 Notice of filing petition for writ of certiorari for Appellant Sillasse Bryan dated 4/2/97 filed. Supreme Ct#: 96-8422. (cr16)

7/11/97 Appellee USA motion to publish summary order as opinion FILED (w/pfs). (cr12)

7/18/97 Appellant Sillasse Bryan response to the motion to publish summary order with proof of service filed. (cc: Panel) (cr12)

9/4/97 Order FILED GRANTING motion to publish summary order as opinion [1011322-1] by Appellee USA, endorsed on motion form dated 7/11/97. (Per: JMW, FIP, GWH) (cr12)

9/4/97 Non-dispositive opinion filed, from order GRANTING motion to publish summary order as opinion [1011322-1] by Appellee USA, endorsed on motion form dated

7/11/97. Judgment of the U.S. District Court for the Eastern District of New York AFFIRMED by published signed PER CURIAM opinion filed. (Originally decided by summary order filed 2/10/97; publishing the substance of the prior summary order in this per curiam opinion) (cr12)

- 9/12/97 Note: the OPINION PRICE is \$ 1.40 (rek)
- 9/12/97 Slip opinion for Appellant Sillasse Bryan, Appellee USA received. (cr10)
- 12/18/97 Notice from Supreme Court granting Appellant Sillasse Bryan petition for a writ of certiorari is granted with scheduling order. (cr10)
-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
UNITED STATES OF AMERICA	<u>INDICTMENT</u>
- against -	Cr. No. CR-95-765
SILLASSE BRYAN,	(18 U.S.C. §§ 371,
also known as "Uzi,"	922(a)(1)(A),
Defendant.	924(a)(1)(D),
-----X	2 and 3551 <i>et seq.</i>)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between August 6, 1992 and August 31, 1993, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, together with others, did knowingly and intentionally conspire to violate Title 18, United States Code, Section 922(a)(1)(A), by willfully engaging in the business of dealing in firearms.

In furtherance of said conspiracy, and to effect its objects, the defendant SILLASSE BRYAN, also known as "Uzi," and others, committed and caused to be committed the following:

OVERT ACTS

1. On or about December 28, 1992, SILLASSE BRYAN paid another individual approximately \$300 in United States currency to purchase two firearms.

2. On or about December 28, 1992, SILLASSE BRYAN took possession of the two firearms referred to in Overt Act One.

3. On or about February 10, 1993, SILLASSE BRYAN took possession of two firearms which another individual had purchased for him.

(18 U.S.C. §§ 371 and 3551 *et seq.*)

COUNT TWO

On or about and between December 28, 1992 and August 31, 1993, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, did knowingly and willfully engage in the business of dealing in firearms.

(18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D), 2 and 3551 *et seq.*)

A TRUE BILL

FOREPERSON

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Barbara D. Underwood
ACTING UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
UNITED STATES OF AMERICA	SUPERSEDING
- against -	<u>INDICTMENT</u>
SILLASSE BRYAN,	Cr. No.
also known as "Uzi,"	95-786 (S-1) (DGT)
Defendant.	(18 U.S.C. §§ 371,
-----X	922(a)(1)(A),
	924(a)(1)(D),
	2 and 3551 <i>et seq.</i>)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between August 6, 1992 and August 31, 1993, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, together with others, did knowingly and intentionally conspire to violate Title 18, United States Code, Section 922(a)(1)(A), by willfully engaging in the business of dealing in firearms.

In furtherance of said conspiracy, and to effect its objects, the defendant SILLASSE BRYAN, also known as "Uzi," and others, committed and caused to be committed the following:

OVERT ACTS

1. On or about December 28, 1992, SILLASSE BRYAN paid another individual approximately \$300 in United States currency to purchase two firearms.

2. On or about December 28, 1992, SILLASSE BRYAN took possession of the two firearms referred to in Overt Act One.

3. In or about December 1992, SILLASSE BRYAN took the two firearms referred to in Overt Act One to Brooklyn, New York.

4. On or about February 10, 1993, SILLASSE BRYAN took possession of two firearms which another individual had purchased for him.

(18 U.S.C. §§ 371 and 3551 *et seq.*)

COUNT TWO

On or about and between December 28, 1992 and August 31, 1993, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, did knowingly and willfully engage in the business of dealing in firearms.

(18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D), 2 and 3551 *et seq.*)

A TRUE BILL

FOREPERSON

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Barbara D. Underwood
ACTING UNITED STATES ATTORNEY
PURSUANT TO 29 C.F.R.

PETITIONER'S REQUEST #2

SUBSTANTIVE OFFENSE

In order to sustain its burden of proof for the crime charged in count 2 the Government must prove beyond a reasonable doubt:

(1) That the Defendant SILLASSE BRYAN engaged in the business of dealing in firearms;

(2) The Defendant was, at the time charged, not then a federally licensed firearms dealer;

(3) The Defendant acted willfully.

2 Devitt & Blackmar "Federal Jury Practice and Instructions" 36.03 [West Publishing Co. 1990] We respectfully ask the Court to charge the jury specifically on the term "business" as utilized in 18 USC 922(a)(1)(a) to distinguish from the mere act of possession or sporadic transfer. The Court should emphasize the need for ongoing systemic conduct for profit.

PETITIONER'S REQUEST #3SPECIFIC INTENT

The Defendant SILLASSE BRYAN is charged with violations of the Federal Firearms Law. The sections of law which he is charged under require a specific intent to violate the law.

The term "knowingly" as used in these instructions means that he or she was:

- (1) aware of his actions;
- (2) knew what was happening; and
- (3) did not act out of
 - (a) ignorance;
 - (b) carelessness;
 - (c) mistake;
 - (d) accident.

Should you find that the Defendant SILLASSE BRYAN so acted or are unclear why he acted, then you may find a reasonable doubt. 2 Devitt & Blackman "Federal Jury Practice and Instructions," Sec. 17.03 & 17.04 [West 4th Ed., 1990]

PETITIONER'S REQUEST #8KNOWLEDGE OF THE LAW

The Federal Firearms Statute which the Defendant is charged with, conspiracy to violate and with allegedly violated, is a specific intent statute. You must accordingly find, beyond a reasonable doubt, that Defendant at all relevant times charged, acted with the knowledge that it was unlawful to engage in the business of firearms distribution lawfully purchased by a legally permissible transferee or gun purchaser.

In determining Defendant's state of mind and knowledge during this period of time (late December, 1992 through late February, 1993) you may consider the Defendant's educational, social and informational background (and gay) in determining whether he received the weapons both at a time and under circumstances when he knew that his alleged possession and subsequent transfer were in violation of USI 922(a).

You may not engage in speculation conjecture or surmise in determining Defendant's knowledge and intent. You must consider only the proof admitted at the trial. The test is not what he could have known, may have known or should have known under the circumstances. Rather, you must be persuaded that with the actual knowledge of the federal firearms licensing laws Defendant acted in knowing and intentional violation of them. "Modern Federal Jury Instructions" 8.05 [Siffert & Sand] *United States v. Ratzlaff, U.S.*

* * *

[p. 322] MR. ADLER: Page 23 of Your Honor's proposed charge speaks about license. Ratzlaff against United States, 114 Supreme Court 655, and a number of other cases about specific knowledge dealing with the knowledge of people dealing with this and so on. I take issue with the language the Court used. I submit that the government was required to prove that [p. 323] he knew and engaged in the conduct that such a license was required.

THE COURT: Go to the Supreme Court and see if they agree. I will not put the end to this statute.

* * *

[p. 344] As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes charged to you, I will on occasion explain that, before you can find the defendant [p. 345] guilty, you must be satisfied that the defendant was acting knowingly and intentionally. Let me explain what is meant by these terms under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake, accident, or other innocent reason. A person acts intentionally if he acts deliberately and with the specific intent to do something the law forbids. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But, he must act with the specific intent to do whatever it is the law forbids. A person acts willfully if he acts intentionally and purposely and with the intent to do

something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

* * *

[p. 349] The evidence in this case contains a certificate [p. 350] showing that after a diligent search of all of the records maintained by the Secretary of the Treasury relative to the issuance or denial of firearms licenses, it was determined that the defendant, Sillasse Bryan, never executed or filed an application for a federal firearms license. From such evidence you may find that the government has sustained its burden of proving beyond a reasonable doubt that the defendant was not licensed under the Gun Control Act to deal in firearms.

In this case, the government is not required to prove that the defendant knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law. However, the government must prove that the defendant acted willfully. In order to satisfy this element, the government must prove that the defendant acted knowingly and purposely and that the defendant intended to commit an act which the law forbids.

* * *

UNITED STATES of America, Appellee,

v.

Sillasse BRYAN, aka "Uzi,"
Defendant-Appellant.

No. 884, Docket 96-1450

United States Court of Appeals,
Second Circuit.

Argued Jan. 29, 1997.

Decided Feb. 10, 1997.

Published Sept. 4, 1997.

Roger Bennet Adler, New York City, for Defendant-Appellant.

Elaine D. Banar, Assistant United States Attorney (Zachary W. Carter, United States Attorney, Susan Corkery, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY, on brief), for Appellee.

Before: WALKER, PARKER, and HEANEY,* Circuit Judges.

PER CURIAM:¹

Sillasse Bryan appeals from a judgment of conviction of the United States District Court for the Eastern District

* The Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

¹ This appeal was resolved by summary order on February 10, 1997. Upon request of the parties and because we conclude that publication is warranted, we issue this opinion which in substance restates and expands upon that order.

of New York (David G. Trager, *Judge*). Bryan was convicted on July 3, 1996, after a jury trial, of conspiring to engage in the sale of firearms without a license as well as actually engaging in the sale of firearms without a license in violation of 18 U.S.C. §§ 371, 922(a)(1)(A). The Court sentenced Bryan to a term of 57 months in prison and to supervision upon release for three years.

Bryan seeks reversal of his conviction on three grounds: first, that the jury had before it insufficient evidence upon which to convict him of the violations charged; second, that the court erred in failing to charge the jury properly with respect to the credibility of certain witnesses for the government; and, third, that the court erred in instructing the jury that an overt act not set forth in the indictment may constitute an act in furtherance of a conspiracy under 18 U.S.C. § 371. Each of these claims is without merit.

Bryan's first contention is that the jury had insufficient evidence on which to convict him of the willfulness necessary under 18 U.S.C. § 922(a)(1). Defendant's argument, however, rests on a misunderstanding of the law of this circuit. The willfulness element of unlawful sale of firearms does not require proof "that defendant had specific knowledge of the statute he is accused of violating, nor that he had specific intent to violate the statute." See *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir.1995). Rather, this circuit reads the willfulness requirement more "broadly . . . requir[ing] only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." *United States v. Collins*, 957 F.2d 72, 76 (2d Cir.1992). Thus, while we acknowledge

that several of our sister circuits have construed the law more narrowly, *see, e.g., United States v. Sanchez-Corcino*, 85 F.3d 549, 553 (11th Cir.1996) (holding that "in order for the Government to prove the offence of willfully dealing in firearms without a license . . . it must prove that the defendant acted with knowledge of the licensing requirement"), defendant's argument for such a construction of the law in this circuit is foreclosed.

With the proper understanding of the requirement of willfulness in this circuit, defendant's insufficiency argument is unavailing. It is axiomatic that a defendant faces a heavy burden when challenging the sufficiency of the evidence to support a jury's verdict. *See, e.g., United States v. Soto*, 716 F.2d 989, 991 (2d Cir.1983). In passing on such a challenge, the court views the evidence in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979). At trial, the government elicited ample proof that defendant's conduct "was knowing and purposeful" and that he "intended to commit an act which the law forbids." *United States v. Collins*, 957 F.2d at 76. In brief, the government established that Bryan made several trips from his home in New York City to Ohio for the purpose of purchasing firearms that he was unable to obtain legally in New York; that he enlisted the aid of two Ohio women to purchase the firearms on his behalf, knowing that in Ohio purchase was possible with an in-state driver's license alone; that he provided the women the funds to purchase the guns and accompanied them to the dealer; that Bryan confessed to purchasing firearms in Ohio with the intention of transporting them to New York for resale; and, most important, that defendant removed the serial

numbers of the firearms purchased to avoid detection. Viewed in the light most favorable to the government, this evidence is sufficient to establish that Bryan knowingly intended to commit an act which the law forbids. *Id.*

Defendant's second argument on appeal concerns the court's instructions regarding the credibility of two of the government's witnesses, women who aided Bryan in purchasing firearms during his trips to Ohio. As an initial matter, we note that defendant's counsel failed to object to the credibility charge given by the district court. Joint Appendix 128-29. Thus, notwithstanding the inclusion of the sought after charge in defendant's proposed instruction submitted to the court, we review for plain error. *See, e.g., United States v. Wong*, 40 F.3d 1347, 1373 (2d Cir.1994). In order for a plain error to be noticed under Fed.R.Crim.P. 52(b), that error must "(1) be actual error; (2) be plain, which is synonymous with clear or obvious under current law; and (3) affect substantial rights, which, in most cases, means that the error must have affected the outcome of the proceeding." *United States v. Gonzalez*, 110 F.3d 936, 945-46 (2d Cir.1997) (citing *United States v. Olano*, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508 (1993)). However, even if an error was committed, it was clear, and it affected substantial rights, we may reverse in our discretion. *See Olano*, 507 U.S. at 736, 113 S.Ct. at 1778 (directing appellate court to exercise discretion in such cases "only if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings") (internal quotation marks omitted).

Defendant's first contention in this regard surrounds his unsuccessful efforts to have the court instruct the jury

that two of the government's witnesses were drug abusers and that they were abusing drugs at the time certain events at issue allegedly occurred. Even assuming that refusal to give this instruction was error and was clear at the time – matters we seriously doubt – we cannot conclude that the district court's refusal "affect[ed] substantial rights." Fed.R.Crim.P. 52(b). In order for an error to affect substantial rights, "[i]t must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. at 1777 (citing cases). However, in the "plain error" context, the defendant bears the burden of persuasion with respect to prejudice, *see id.*, and he has failed to shoulder that burden in this case. The district court thoroughly and carefully instructed the jury on credibility determinations. In fact, the court specifically instructed the jury that "[y]ou should carefully scrutinize all of the testimony given, the circumstances under which each witness testified, and every matter in evidence that tends to show whether a witness is worthy of belief." Joint Appendix at 104. The district court's general charge – together with any evidence elicited by the defense as to the witnesses' history of drug use – was sufficient in this case to alert the jury to their responsibilities in making credibility determinations.

Defendant's second contention regarding the district court's charge to the jury is that the court's instruction insufficiently addressed the conflict inherent in accomplice testimony. Here we find that the district court committed no error, let alone plain error. The district court took care to instruct the jury of the dangers of accomplice testimony and of the need to give the two witnesses'

testimony special attention because both had entered into cooperation agreements with the government. In part, the district court charged:

Because of the very nature of accomplice testimony . . . it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe. You should, for example, ask yourselves whether an accomplice witness would benefit more by lying or telling the truth.

Joint Appendix at 108. Moreover, after specifically identifying the government's two accomplice witnesses and mentioning their plea agreements, the court instructed:

The government is permitted to enter into such agreements. But witnesses who testify pursuant to such agreements have an interest in this case different from an ordinary witness. This is why you must carefully scrutinize whether the testimony of such a witness was made up in any way because the witness believed or hoped that he would receive favorable treatment by testifying falsely.

Id. at 109. In light of this language, defendant's contention that the district court erred is meritless.

Finally, defendant argues that the district court erred in charging the jury that an overt act not included in the indictment can constitute the foundation of a conspiracy conviction. Defendant's argument fails. The court has specifically held that a conspiracy "conviction may rest on an overt act not charged in the indictment." *United States v. Armone*, 363 F.2d 385, 400 (2d Cir.1966).

For the foregoing reasons, we find defendant's arguments to be without merit. Accordingly, we affirm the judgment of the district court.

Friday, December 12, 1997 Certiorari Granted

96-8422 BRYAN, SILLASSE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari are granted limited to Questions 1 and 2 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.
